

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

TRANSCRIPT OF RECORD.

Court of Appeals of the District of Columbia.

OCTOBER TERM, 1919.

No. 3293. **589**

JOHN W. DAVIDGE, APPELLANT,

vs.

LEO SIMMONS.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF
COLUMBIA.

FILED JULY 11, 1919.

PRINTED AUGUST 7, 1919.

Court of Appeals of the District of Columbia.

OCTOBER TERM, 1919.

No. 3293.

JOHN W. DAVIDGE, APPELLANT,

vs.

LEO SIMMONS, APPELLEE.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF
COLUMBIA.

INDEX.

	Original.	Print.
Caption	<i>a</i>	1
Complaint	1	1
Summons	2	2
Marshal's return; judgment; appeal noted.....	3	2
Certificate of municipal court on appeal.....	3	3
Affidavit of plaintiff.....	4	3
Affidavit of defense.....	11	7
Exhibits	15	9
Motion for judgment.....	17	10
Motion for judgment argued and submitted; motion granted; judgment; appeal noted.....	18	11
Memorandum: Supersedeas bond approved and filed.....	18	11
Assignment of errors.....	18	11
Designation of record.....	19	12
Clerk's certificate	20	12

Court of Appeals of the District of Columbia.

No. 3293.

JOHN W. DAVIDGE, Appellant,

vs.

LEO SIMMONS.

a Supreme Court of the District of Columbia.

No. 62260. At Law.

LEO SIMMONS, Plaintiff,

vs.

JOHN W. DAVIDGE, Defendant.

UNITED STATES OF AMERICA,
District of Columbia, ss:

Be it remembered, That in the Supreme Court of the District of Columbia, at the City of Washington, in said District, at the times hereinafter mentioned, the following papers were filed and proceedings had, in the above entitled cause, to wit:

1 *Complaint and Summons.*

In the Municipal Court of the District of Columbia.

Filed March 17, 1919.

In the Supreme Court of the District of Columbia.

No. 62260. At Law.

LEO SIMMONS, Plaintiff,

vs.

JOHN W. DAVIDGE, Defendant.

DISTRICT OF COLUMBIA, *To wit:*

Your Complainant Leo Simmons being first duly sworn according to law, states that he is entitled to the possession of the premises known as Apartment No. 42 in the Apartment house building known as 2139 Wyoming Avenue, located in the District of Columbia, and

that the same is unlawfully detained from him and held without right by the defendant John W. Davidge, to whom the complainant had heretofore rented the said premises as a tenant for one year, beginning Oct. 1, 1917, and whose tenancy and estate has been determined by its expiration, as provided in the agreement under which said tenancy was established and the service of a due notice to quit upon the defendant personally on the 25th day of Nov., 1918, requiring the said defendant to vacate said premises thirty days thereafter. Complainant therefore prays that a Summons be issued, commanding the defendant to appear and show cause why judgment should not be given against him for the restitution of the possession of said premises, 2139 Wyoming Avenue, Apartment 42, and costs of this suit.

LEO SIMMONS,
Plaintiff.

Subscribed and sworn to before me this 19 day of Feb. A. D. 1919.

H. M. HULL, [SEAL.]
Ass't Clerk.

Summons.

* * * * *

The President of the United States to the defendant, John W. Davidge, Greeting:

You are hereby summoned to appear in this Court on the 4th day of March, A. D. 1919, at 10 o'clock A. M., to answer the plaintiff's complaint and show cause why judgment should not be given against you for the restitution of the possession of the premises described in the complaint under oath filed herein by said plaintiff and costs of this suit, and in case of your failure so to appear and answer, the suit will be proceeded with as in case of default.

Witness the Honorable Judges of said Court this 19 day of Feb., A. D. 1919.

BLANCHE NEFF, [SEAL.]
Clerk,

By R. H. COLLINS,
Assistant Clerk.

\$1.00 Pd. Clerk.

Marshal's Return.

2/19, 1919.

Summoned as within directed.

MAURICE SPLAIN,
U. S. Marshal.
By JAS. H. MCGILTON,
Deputy Marshal.

(Endorsed.)

Mar. 4, 1919.

Judgment after trial for defendant for costs. Deft. relied upon
Saulsbury Resolution, service of 30 days' notice admitted.

STRASBURGER,
Judge.

Appeal noted in open Court.

STRASBURGER.

Certificate of Municipal Court on Appeal.

* * * * *

Date.

Proceedings.

1919.

Feb. 19th. Sworn complaint filed.

" " Summons and copy issued returnable March 4--10 A. M.

" " Summons returned "summoned as within directed."

March 4th. Judgment after trial for defendant for costs.

" " Appeal noted in open Court.

" 5th. Appeal, undertaking on, with B. L. Simmons, surety, approved and filed.

4

Date.

Proceedings.

1919.

March 13th. Appeal, record on and papers filed with Clerk of Supreme Court, D. C., and notice sent to plaintiff's attorney.

This is to certify, that the foregoing is a true copy of the Docket Entries and of all the proceedings had before the said Court in the above cause, and that the annexed documents are all the original papers filed in said cause.

Witness the Honorable Judges of said Court this 13th day of March, A. D. 1919.

• BLANCHE NEFF,
Clerk.

Costs paid by Plaintiff, \$3.85.

Affidavit of Plaintiff.

Filed March 25, 1919.

* * * * *

I, Leo Simmons, on oath say: That I am the plaintiff named in the above action against the defendant, John W. Davidge; that said cause of action is based upon the facts hereinafter set forth and stated,

That heretofore, to wit, on the 6th day of August, 1917, the affiant, as owner, of apartment 42 of premises known as 2139 Wyoming Avenue situated in the District of Columbia, entered into a written agreement with the defendant for the occupancy of said apartment for one year, beginning on the first day of October, 1917, and ending
5 on the 30th day of September, 1918.

That the said defendant agreed to pay to the affiant, for the use of said apartment, \$1260 for the term of one year, in monthly installments of \$105.00.

That the said defendant occupied said apartment and paid the rent therefor, as agreed, during the term of the said lease, which ended and expired on the 30th day of September, 1918, aforesaid, and notwithstanding due notice to quit still continues to occupy said apartment contrary to the terms and covenants of said lease.

That, to wit, on the 4th day of October, 1918, on the promise to affiant, that he, the defendant, would sign a renewal lease for said apartment and amicably adjust any difference between us, affiant cashed the check of \$105.00 sent to him for the month of October, 1918, and thereby, without intending so to do, constituting the said defendant a tenant at sufferance, under the provision of the Code of the District of Columbia. Said defendant having refused to comply with his verbal promise made in October, over the telephone, that he, the defendant, would call and see affiant and amicably adjust the matter with him, and upon his statement thereafter, that he intended to hold said premises and keep possession of same against affiant's will and in violation of the terms of his lease, affiant on the 23rd day of November, 1918, served notice upon the said defendant to quit said premises, that he desired to have and regain possession of said apartment and premises described in said lease. That said notice to quit is in the following words and form:—

6

WASHINGTON, D. C., Nov. 23rd, 1918.

Mr. John W. Davidge, Apartment 42, 2139 Wyoming Avenue, Washington, D. C.

DEAR SIR:

Take notice that I desire to have again and repossess the tenement and premises known as Apartment 42 at 2139 Wyoming Avenue, in the District of Columbia which you now occupy and hold of me as tenant by sufferance, and I therefore give you notice to remove from and quit said premises at the expiration of thirty days from the date of the service of this notice upon you.

Very truly yours,
(Signed)

LEO SIMMONS.

That said notice was duly served upon said defendant personally on the 25th day of November, 1918.

That said defendant, having failed to vacate said premises and surrender possession, as demanded and required by said notice, affiant on February 19, 1919, begun an action in the Municipal Court

of the District of Columbia to recover possession of said premises, as will more fully appear from the complaint and summons certified to this Court by said Municipal Court.

That affiant has not accepted any sum from said defendant as rent or received any compensation for the use and occupancy of said premises and services furnished him and his family since, to wit, the 4th day of October, 1918, at which time a check for the sum of \$105.00, sent by the defendant as aforesaid, was received and cashed under the conditions before mentioned. That said affiant would not have cashed said check except upon the conditions stated, namely, that he, defendant, would call at his office in a few days and amicably adjust the matter with him and renew his lease, as affiant
7 otherwise had no intention of permitting said defendant to remain in said premises, and did not intend by his act to bring about the relations of tenant by sufferance, thus necessitating the delay by requiring a thirty days' notice to quit.

The said defendant well knew the fact to be, that the apartment he rented was, usually and customarily, only leased by the year, and that same would not be let under a monthly agreement, subject to notice.

The said defendant being a member of the bar of this Court also knew, that a tenant at sufferance holding over, beginning in the month of October would thereby gain an unfair advantage, because of the fact, that he could quit at any time he saw fit, without notice, and could remain in said premises during the winter months, at a time the cost of maintaining same was very heavy, and quit, at the time the owner's opportunity to gain remuneration for his investment begun, namely, in the summer months.

That the said defendant refused to sign any lease with the affiant, the owner of said property, and stated that he intended to stand upon the said Saulsbury Resolution, the same being an act of Congress, approved May 31st, 1918, and known as Public Resolution 31, 65th Congress.

Affiant further states, that he has refused to accept any sum from the defendant as rent of said premises, after being advised by him that he would hold possession by reason of said law.

That at the time he rented said property to the defendant, by written agreement to begin October 1, 1917, and end Sept. 30, 1918, the said defendant was advised that the yearly rental of said
8 apartment was \$60.00 per annum more than he, defendant, was charged for same.

Said apartment contains or consists of eight large rooms, three baths, two porches and an extra lavatory, with janitor and elevator service; and is located in one of the very best residential sections of the District of Columbia.

That said rent was reduced \$60.00 for the year, at the defendant's request, and for a period of one year only.

That before the expiration of said lease, to wit, Sept. 30, 1918, the defendant well knew and was aware of the fact that the affiant would sustain considerable loss by permitting him to remain at the same rate as under his former lease, because of the fact that the cost for

the maintenance of said building (in which said apartment is located) had increased more than double the amount since the time the lease was entered into.

That notwithstanding the great increase in maintaining said building, including insurance, taxes, repairs, fuel for heat, janitor and elevator services, light, etc., since the time he entered, and notwithstanding the fact, that affiant had, at the request of the defendant, reduced the rate of said apartment \$5.00 per month, when the defendant took same, and affiant only demanded an increase of \$10.50 per month, to assist him in payment of the increased expenses; yet said defendant, refused to allow affiant anything whatever, and openly stated that he had no intention of doing so; that at the trial of the case in the Court below, the said defendant, through his attorney admitted due notice, aforesaid, and stated that he relied solely upon

9 the Saulsbury Resolution to maintain possession of said property against the plaintiff's will and in disregard of his covenant to deliver up possession of the said apartment at the expiration of his tenancy. Affiant is advised that said defendant is a member of the bar of this Court, but on his own solicitation was appointed as Captain in the Ordnance Reserve Corps, U. S. Army, to wit, in 1918, and by special order of July 25th, 1918, appointed Major and assigned to Chief of Staff, Purchase, Stores and Traffic, none of which was more than civil duties and does not under the circumstances excuse him, as a lawyer, from the repudiation of his agreement.

That said defendant, as aforesaid, has never tended or offered to pay the said plaintiff for the use of said premises, except by sending checks to affiant, which checks affiant has refused to accept and returned same to the said defendant, because the checks were in amount fixed by the expired lease, and upon the face of each and all of them, was written, "Rent of Apartment 42, 2139 Wyo. Ave. for the Mo.," said defendant intending the same to act as a receipt in full to him for the month indicated.

Affiant declined to accept said checks, the last one being dated and received on the 20th of March, purporting to be rent for the month of March, 1919, all of which checks affiant has returned to the said defendant.

That because of said defendant's action and conduct, as above set forth, affiant does not consider him a desirable tenant and does not wish to deal with him as such.

That the defendant's contention that he had the right to hold possession of said property, notwithstanding the expiration of his lease, and the notice to quit in due form, aforesaid, under and by virtue of the said Saulsbury Resolution, was given effect by the
10 Municipal Court and a judgment entered in his favor against the plaintiff.

Affiant is advised and so avers, that the defendant is estopped to deny the covenants and conditions in his said agreement and that the plaintiff is entitled to judgment for possession by reason of said estoppel.

That the said Saulsbury Resolution is unreasonable, unjust, be-

cause it confiscates and deprives affiant of his property without any hearing and without due process of law and in violation of the 5th Amendment of the Constitution of the United States; that said joint resolution is therefore void as being in conflict with said 5th Amendment because, among other things, it fails to provide for or give affiant, as an owner of said premises, a hearing as to compensation, and that he is therefore, entitled to judgment for possession of said property notwithstanding said Saulsbury Resolution or anything therein contained.

LEO SIMMONS.

Subscribed and sworn to this 25th day of Mch., 1919.

JOHN R. YOUNG,

Clerk,

By CHAS. B. COFLIN,

Ass't Cl'k.

11

Affidavit of Defense.

Filed April 4, 1919.

* * * * *

I, John W. Davidge, on oath depose and say: That I am the defendant in the above entitled cause, wherein Leo Simmons is the plaintiff; that I have a good and meritorious defense to the claim of the said plaintiff which is as follows: That on the 6th day of August, 1917, I leased for a period of one year beginning the first day of October, 1917, and ending September 30, 1918, apartment No. 42, in premises known as No. 2139 Wyoming Avenue, N. W., in the City of Washington, District of Columbia. That the agreed rental as stipulated in the said agreement was \$1,260.00 for a term of one year to be paid in monthly installments of \$105.00. That under and by virtue of a Joint Resolution of Congress known as the Saulsbury Resolution, approved on May 31, 1918, I continued in possession and am now in possession of said premises, and am informed, believe and therefore aver, that I have a right to remain in possession until a treaty of peace is definitely concluded between the Imperial German Government and the United States. That I was willing to sign a lease with the said plaintiff to expire one year from the expiration of my former lease but the said plaintiff failed to present the proper lease for my signature. That there are no amicable adjustments to be made between us, but the said plaintiff by a system of annoyances filed numerous suits against me in the Municipal Court of the District of Columbia. On the 7th day of November a suit was filed against me. Landlord and Tenant No. 166240, and the

12 case was set for the 19th day of November 1918. After trial of said case the plaintiff took a nonsuit. On the 2nd day of December, 1918, said plaintiff sued me in the Municipal Court, Law

No. 54055, for use and occupation of premises occupied by me, for \$130.00 which was also nonsuited by the said plaintiff, and on February 20, 1919, the said plaintiff filed in the Municipal Court of the District of Columbia, Law No. 55117, a suit against me for \$476.66 and after the case had been continued one week from the service of the said summons and upon my attorney insisting upon said case being tried, the said plaintiff took a nonsuit. On the 19th day of February, 1919, the said plaintiff filed in the Municipal Court, Landlord and Tenant No. 169745, claiming the estate had been determined by the expiration of the tenancy, and this case was tried before one of the Judges of the Municipal Court, who held that the Saulsbury Resolution was in force and that the said plaintiff not being employed in the government or officially connected therewith, was not entitled to recover and therefore judgment was given for defendant and this is said case which is now being heard upon appeal. I am ready and willing to pay rent for said premises and I hereby tender all rent due by me to the plaintiff and offer to pay the said amount of rental into the Registry of the Court for final disposition or upon order of the Court. The affiant states during a period of about five months he sent checks which are herewith attached and marked A. B. C. D. and E, and the plaintiff returned all of said checks. The statement by the plaintiff relative to the customary terms of the lease is immaterial and the affiant sees no reason why this statement appears in the Affidavit of merit. This affiant
13 admits he is a member of the bar of the Supreme Court of the District of Columbia and therefore he believes that the Saulsbury Resolution gives him the right to remain in possession without a lease. The affiant states that the question of loss or gain, or the value of the apartment, or the cost of service he is not compelled to answer and if it is material at the trial of the case he will produce witnesses to prove that the rental paid by him to the plaintiff is as much as the apartment is actually worth and is more than is being paid by other- in apartment- similarly located in same neighborhood and of a similar kind and size as the one occupied by me. The affiant admits that he was commissioned a Captain in the United States Army in December, 1917, and promoted to Major July 31, 1918, and later assigned to the P. S. & T. Div. General Staff. The affiant denies that upon his own solicitation he was appointed Captain in the Ordnance Reserve Corps, United States Army, and states that on the contrary his services were desired for special duty by the Ordnance Department by reason of his experience, and that he has at all times been subject to the orders of his commanding officer as to both station and duties. He denies the inference that he repudiated his agreement, but to the contrary never made any agreement or contract with the plaintiff, which he will also prove at the time of the trial. This affiant says that he has tendered, and, now tenders the plaintiff for rental of apartment up to and including the present month, and tenders in Court, currency of the United States for the full amount, but as this suit was instituted not for default of payment of rent but

14 for possession of the apartment, this affiant says that the allegations relative to the failure to pay rent is immaterial, but knowing that fact and to show his good faith he is willing and ready to pay the full amount of the rental charges. This affiant is at a loss to understand why the plaintiff opposes the quotation as stated in the affidavit, "Rent of Apartment No. 42, No. 2139 Wyoming Ave., for the month of." This is proper to prove that the money was not paid on account but in settlement of the month's rent; it is true that all these several checks tendered were tendered in payment of a month's rent and intended to be a receipt in full for the month indicated. This affiant maintains that under and by virtue of the Saulsbury Resolution, hereinbefore quoted, he is entitled to remain in possession of the premises until peace with the Imperial German Government is definitely concluded. The affiant says he is unable to understand what the plaintiff means by "that the defendant is estopped to deny the covenants and conditions in his said agreement and that the plaintiff is entitled to judgment for possession by reason of said estoppel." From the plaintiff's own statement there is no agreement in existence at the present time and the affiant is unable to comprehend the meaning of this last statement or the other disconnected statements made in plaintiff's affidavit. While the affiant believes that it is not necessary to answer the problem set forth by the plaintiff that the Saulsbury Resolution is unreasonable, nevertheless maintains that the Saulsbury Resolution is reasonable and does not confiscate or deprive the plaintiff of his property, in violation of the Constitution of the United States, and, for the reasons hereinbefore set forth, the affiant says that the plaintiff is not in Government service nor officially connected there-

15 with and does not necessarily require the said premises for himself, wife, children or dependents, and is therefore not entitled to a judgment for possession.

Further affiant sayeth not.

JOHN W. DAVIDGE.

Subscribed and sworn to before me this 3rd day of April, 1919.

[SEAL.]

NELLIE H. GROCK,
Notary Public, D. C.

Exhibits.

No. 704.

WASHINGTON, D. C., Nov. 1, 1918.

American Security & Trust Company, 15-55

Pay to the order of Leo Simmons One hundred five and no/100 Dollars.

\$105.00/100.

[J. W. DAVIDGE.]*

(Rent Apt. 42-2139 Wyo. Ave. Nov. '18.)

[*Signatures enclosed in brackets erased in copy.]

No. 713.

WASHINGTON, D. C., Nov. 29, 1918.

American Security & Trust Company, 15-55

Pay to the order of Leo Simmons One hundred five and no/100 Dollars.

\$105.00/100

[J. W. DAVIDGE.]*

Rent Apt. 42-2139 Wyo. Ave. Dec. 1918.

16 No. 725.

WASHINGTON, D. C., Dec. 31, 1918.

American Security & Trust Company, 15-55

Pay to the order of Leo Simmons One hundred five and no/100 Dollars.

\$105.00/100

[J. W. DAVIDGE.]*

(Rent Apt. #42-2139 Wyom. Ave. Jan. 1919.)

No. 737.

WASHINGTON, D. C., Jan. 31, 1919.

American Security & Trust Company, 15-55

Pay to the order of Leo Simmons One hundred five and no/100 Dollars.

\$105.00/100

[J. W. DAVIDGE.]*

(Rent Apt. 42, 2139 Wyom. Ave. Feb., 1919.)

No. 755.

WASHINGTON, D. C., March 20, 1919.

American Security & Trust Company, 15-55

Pay to the order of Leo Simmons One hundred five and no/100 dollars.

\$105.00/100

[J. W. DAVIDGE.]*

(Rent Apt. 42, 2139 Wyom. Ave., Mch. '19.)

17

Motion for Judgment.

* * * * *

Now comes the plaintiff, Leo Simmons and moves the Court to enter judgment in this cause for possession of the premises described in landlord and tenant complaint, namely, Apartment 42, of the building known as 2139 Wyoming Avenue and involved in the proceedings in this cause, upon the grounds that the defendant's affidavit does not state facts sufficient to constitute a defense to the action.

LEO SIMMONS.

B. L. SIMMONS,
Att'y for Pl'ff.

To J. I. Peyser, attorney for defendant:

Take notice I have calendared the above motion for a hearing at the next regular motion day of the Court.

LEO SIMMONS.

Supreme Court of the District of Columbia.

Friday, June 13th, 1919.

Session resumed pursuant to adjournment, Mr. Justice Gould presiding.

* * * * *

Come now the parties hereto by their respective attorneys of record; whereupon plaintiff's motion for judgment for want of a sufficient affidavit of defense under Law Rule 19 of this Court is argued
18 and submitted. Upon consideration thereof it is ordered that said motion be, and the same hereby is granted.

Wherefore, it is considered that the plaintiff herein do have and recover of the defendant herein possession of the premises known as Apartment No. 42 in the Apartment house building known as 2139 Wyoming Avenue, North West, located in the District of Columbia, together with the costs of suit, to be taxed by the Clerk, and have execution thereof.

From the foregoing judgment the defendant by his Attorney in open Court, notes an appeal to the Court of Appeals, and the penalty of a bond on said appeal to operate as a supersedeas, is hereby fixed in the sum of one thousand dollars, (\$1,000.00).

Memorandum.

June 13, 1919.—Supersedeas bond approved and filed.

Assignment of Errors.

Filed June 16, 1919.

* * * * *

Now comes the defendant and says that the Court erred as follows:

First. In rendering judgment against the defendant for possession under Rule 19, because the said rule is inconsistent with the statute governing landlord and tenant cases.

19 Second. That an issue of fact was raised which ought to have been submitted to a jury.

Third. That the plaintiff did not set forth a complete cause of action in the affidavit of merit to justify judgment.

Fourth. That the affidavit of defense filed denied the right of the plaintiff to recover.

Fifth. For other errors that are apparent on the face of the record.

JULIUS I. PEYSER,
Attorney for John W. Davidge.

Designation of Record.

Filed June 16, 1919.

* * * * *

The Clerk of the Court will certify the following pleadings and papers in the above entitled cause to the Court of Appeals of the District of Columbia:

1. Complaint and summons of the Municipal Court.
2. Certificate of Municipal Court on appeal.
3. Affidavit of plaintiff under 19th Rule.
4. Affidavit of defense.
5. Motion for judgment under 19th Rule.
6. Order of the Court entered June 13, 1919.
7. Memorandum showing bond approved and filed on June 13, 1919.
8. Assignment of errors.

J. I. PEYSER,
Attorney for John W. Davidge.

20 Supreme Court of the District of Columbia.

UNITED STATES OF AMERICA,
District of Columbia, ss:

I, John R. Young, Clerk of the Supreme Court of the District of Columbia, hereby certify the foregoing pages numbered from 1 to 19, both inclusive, to be a true and correct transcript of the record, according to directions of counsel herein filed, copy of which is made part of this transcript, in cause No. 62260 at Law, wherein Leo Simmons is Plaintiff and John W. Davidge is Defendant, as the same remains upon the files and of record in said Court.

In testimony whereof, I hereunto subscribe my name and affix the seal of said Court, at the City of Washington, in said District, this 30th day of June, 1919.

[Seal Supreme Court of the District of Columbia.]

JOHN R. YOUNG,
Clerk,
By W. E. WILLIAMS,
Assistant Clerk.

Endorsed on cover: District of Columbia Supreme Court. No. 3293. John W. Davidge, appellant, vs. Leo Simmons. Court of Appeals, District of Columbia. Filed Jul- 11, 1919. Henry W. Hodges, clerk.

COURT OF APPEALS
DISTRICT OF COLUMBIA
FILED

DEC 3 -

Henry W. Hodges
Clerk

**Court of Appeals of the District
of Columbia**

OCTOBER TERM, 1919

No. 3293.

JOHN W. DAVIDGE, APPELLANT,

vs.

LEO SIMMONS, APPELLEE.

REPLY TO APPELLANT'S MOTION TO STRIKE OUT
APPELLEE'S BRIEF AND FOR JUDGMENT
FOR DEFENDANT.

BATES WARREN,
W. H. SHOLES,
BERKELEY L. SIMMONS,

Attorneys for Appellee.

COURT OF APPEALS OF THE DISTRICT OF
COLUMBIA.

OCTOBER TERM, 1919.

No. 3293.

JOHN W. DAVIDGE, APPELLANT,

vs.

LEO SIMMONS, APPELLEE.

REPLY TO APPELLANT'S MOTION TO STRIKE
OUT APPELLEE'S BRIEF AND FOR JUDG-
MENT FOR DEFENDANT.

After appellant had filed his brief on the merits, appellee filed a motion to dismiss or affirm, accompanied by a brief supporting the motion, which brief went into the merits of the case. The court postponed the motion until the hearing of the case on its merits, thereupon appellant filed what he designated as a reply, but which on inspection proves to be a motion to strike out appellee's brief, accompanied by motion for judgment based on matter entirely outside the record and not before this court in any manner whatsoever.

Except for the fact that appellant charges "impertinent and scandalous matter" in appellee's brief, we should make no reply to his *motion for judgment*, because this court will not consider statements contained in briefs of counsel where

the matter of which he complains is not before the court by appropriate proceedings.

On pages 2 and 3 of his alleged reply appellant quotes all the so-called "impertinent and scandalous matter." We respectfully submit that the language used is neither impertinent nor scandalous and refers solely to the appellant, and while it may not be as dignified as usually employed, yet we most earnestly direct the court's attention to the provocation.

On October 1st, 1917, the appellant entered into a lease with appellee for one year for the rent of apartment No. 42 in the apartment house known as 2139 Wyoming Ave. (Rec., 4), one of the choice locations in the city of Washington. The apartment contains eight large rooms, three bath rooms, two porches and an extra lavatory. There was the usual elevator and janitor service (Rec., 5).

The rent of this apartment was then \$110. per month, but at the request of appellant, appellee consented to reduce the rent for the year to \$105 per month (Rec., 5).

Before the expiration of the year appellee advised appellant that to meet the increased expenses, in the new lease he would ask an increase of \$10.50 per month (Rec., 6), which was but \$5.50 more than the scheduled rate for the apartment in October, 1917. Appellant notified appellee that he would call at the latter's office in a few days and amicably adjust the matter with him and renew his lease (Rec., 5). Upon the strength of this appellee cashed appellant's check for \$105. for the October, 1918, rent. Subsequently, appellant refused to sign a lease and stated that he intended to stand upon the Saulsbury Resolution.

Appellant in his affidavit of defence (Rec., 7) says "that under and by virtue of a Joint Resolution of Congress, known as the Saulsbury Resolution, approved on May 31, 1918, I continued in possession and am now in possession of said premises, and am informed, believe and therefor

aver, that I have a right to remain in possession until a Treaty of Peace is definitely concluded between the Imperial German Government and the United States." Again appellant says (Rec., 8) "that this affiant admits he is a member of the Bar of the Supreme Court of the District of Columbia, and therefore he believes that the Saulsbury Resolution gives him the right to remain in possession without a lease."

At the opening of this controversy the landlord simply requested a raise of 10 per cent, based upon *the reduced rate* made at the tenant's request, or barely 5 per cent over the scheduled rate of the apartment, notwithstanding the increase of from 50 to 100 per cent in the cost of maintenance.

The appellant well knowing the appellee's position in the matter, as outlined herein, without just cause, reversed his attitude and refused to pay any increase, stating that "there are no amicable adjustments to be made between us," and took the stand and made the charge in his brief through his attorney, that the appellee desired possession of his apartment for the sole purpose of profiteering. This unwarranted attack by the appellant upon the appellee provoked the criticism complained of in the appellee's brief.

Attention is directed to the following quotations from appellant's brief:

"And the very words of the affidavit of merit filed by the plaintiff shows that plaintiff desired possession only in order to re-lease the apartment at a higher rental" (p. 8).

"Defendant's affidavit strikingly shows the attitude of plaintiff, who is deprived of the opportunity of making larger profits during the present time" (p. 8).

"Appellee seeks to oust the defendant so that he may rent the place at a higher rental" (p. 9).

The word "attitude" must mean behavior and conduct regarding some matter indicating a purpose. Was the appellant justified in making the charge even indirectly, that the purpose of the appellee was to profiteer? In the present condition of the public mind, nothing could be more reprehensible than to charge a man with profiteering. Surely the appellee has made *no more* scandalous attack on the appellant than he has made against the appellee. If the appellee is at fault the appellant is more so.

THE MAJOR.

The question whether appellant is a major, in the United States Army or a plumber on his own resources has no proper place in this case. The so-called Saulsbury Resolution does not afford any greater protection to a tenant because he is employed by the United States Government over a tenant who is in any other occupation. This, we think, is one of the unconstitutional features of this war emergency act, that it not only sought to protect those employed by the Government or in necessary occupations, but also included casual observers here in Washington who took apartments simply to be at the center of affairs. The only advantage to Government employees under the resolution was in favor of those who necessarily required his property, for himself, his family or dependents while "he is in the employ or officially connected with any branch of the Government." Hence, we say the fact that appellant, a tenant, is a major in the employ of the United States gives him no advantage under the resolution and could only have been introduced and dwelt upon by the appellant in his brief in the hope of influencing this court because of his being a major in the employ of the United States.

In his brief, page 9, appellant says:

"Defendant is an officer in the United States Army, subject to general orders of his commanding officers. His present orders are for duty in Washington. It is to the interests of the United States Government that he be not disturbed in possession of his home so far as the law will permit."

Later, on the same page, appellant says:

"A Major in the United States Army rents an apartment and fulfills all the conditions of the law."

The official character of the appellant, being so played upon and by his own admission being stationed in Washington, we put him in a swivel chair. If we were impertinent we are willing to drop the Major entirely from the case and let it proceed man to man.

In the cases cited by appellant the objectionable remarks were invariably directed against a judge or the opposing counsel. A very complete note on the subject is found in 59 Law Ed., U. S. Supreme Court Reports, page 1089, in connection with the reported opinion in *Royal Arcanum vs. Green*. In practically all the cases there noted the attack was against the trial judge or opposing counsel. In two or three instances the language was directed against both the adverse party and his counsel.

We respectfully submit that we are no more at fault regarding the language of the brief than is the appellant.

II.

In the second part of his brief in reply appellant moves this court to render judgment for the defendant because the appellee had sued, obtained judgment and satisfied the judgment *for the use and occupation of the premises* in litigation. He then prints several exhibits, which purport to be

the declaration, particulars of demand and docket entries according to which docket entries as they appear on page 7 of his brief, was commenced long after the judgment in the case at bar was entered and after appeal taken and the record filed in this cause. These docket entries further show that there was other pleadings in the case which are not set out in appellant's reply brief and further, according to appellant's brief.

The record in this case does not disclose any of these proceedings nor is there any assignment of error referred to this court for review touching these proceedings. This move of the appellant is obviously so far removed from the regular and orderly procedure on appeal that we would entirely ignore the matter were it not for the fact that both the appellant and his counsel are eminent and learned members of the bar of this court and must have thought that this court would consider matters entirely outside the record and not legitimately before this court for its decision, although they present no authorities.

The general rule is stated in 3 Cyc., page 176, as follows:

"It is a rule of wide application that an appellate court can consider nothing that is not contained in the record, and will not pass on a question not raised by the record. The sole question which such court is required to determine is whether the judgment which is the subject of review is a legitimate conclusion from the premises which the record contains."

CITING NUMEROUS CASES.

In Penn. Co. vs. Bender, 148 U. S., 255, after the record was made it was sought to show that by appropriate proceedings the cause had been removed to the Federal Court.

The Supreme Court says:

"Now, the record of the common pleas court dis-

closed no order of removal, no steps essential thereto
 * * * The record of another court was presented and
 invoked to compel a decision that there was an error
 in the proceedings of the common pleas court; and in
 support of this contention the case of Kanouse vs.
 Martin, 56 U. S., 15, is cited."

Continuing, the court says:

"But that case does not decide that an appellate and
 reviewing court must examine other than the proceed-
 ings of the court whose judgment is sought to be re-
 viewed. See upon this question the case of Good-
 enough Horseshoe Mfg. Co. vs. Rhode Island Horse-
 shoe Co. decided by this court in 1877 and reported
 only in U. S. Sup. Ct. Reports, L. ed. Bk. 24, p. 368."

In Goodenough Horseshoe Mfg. Co. vs. Rhode Island
 Horseshoe Co., above referred to, the Supreme Court says:

"We can only re-examine the final judgment in the
 suit, and, for that purpose, must look alone to the
 record of that judgment as it is sent to us."

"A receipt by the clerk and the master of a court in
 which an attachment is pending for the debt sued for,
 dated after an appeal is prayed and granted, and bond
 given, in a different suit for rescission, cannot be looked
 to in the Supreme Court, though copied into the rec-
 ord. Mullins vs. Aiken, 49 Tenn., 535."

"A statement in a bill of exceptions of payment by
 the plaintiff in error of the execution issued against
 him upon the judgment on which the writ of error is
 brought, cannot be considered as any part of the bill
 or of the record.—Watson vs. Kane, 31 Mich., 61."

Respectfully submitted,
 BATES WARREN,
 W. H. SHOLES,
 BERKELEY L. SIMMONS,
Attorneys for Appellee.